STATE OF MICHIGAN

COURT OF APPEALS

JOHN J. FISCHER,

Plaintiff-Appellee,

v

GKN SINTER METALS, INC.-ROMULUS, GKN SINTER METALS, INC., and JEFF LEE,

Defendants-Appellants.

UNPUBLISHED
March 16, 2006

No. 264959
Wayne Circuit Court
LC No. 04-406701-NO

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendants appeal by leave granted from a circuit court order denying their motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was required to use nital, a solution of 70 percent nitric acid and alcohol, in his work as a metallurgical technician. Because the department was low on nital, defendant Lee, plaintiff's acting supervisor, asked plaintiff to make some more. They were out of 70 percent nitric acid, so Lee asked plaintiff to use 90 percent nitric acid. Plaintiff expressed reluctance, saying he had heard that 90 percent acid was "risky." Lee expressed confidence in plaintiff's ability to handle the job and plaintiff agreed to do it. Mixing the two chemicals created an explosion and plaintiff was injured.

Plaintiff subsequently brought this action against his employer, GKN Sinter Metals, Inc., and Lee. At issue in this appeal is whether plaintiff's claim comes within the intentional tort exception to the exclusive remedy provision of the worker's compensation act, MCL 418.131(1). The trial court denied defendants' motion for summary disposition, finding that there were issues of fact whether Lee had ordered plaintiff to make the nital and whether defendants knew that 90 percent nitric acid was dangerous.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson,* 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary

disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Worker's compensation benefits are "the exclusive remedy for a personal injury, except for an injury resulting from an intentional tort." *Bock v Gen Motors Corp*, 247 Mich App 705, 710; 637 NW2d 825 (2001). If direct evidence of an intent to injure is lacking, an employee may establish a faux intentional tort, one in which an intent to injure is deemed to exist when in fact no such intent actually exists. *Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330, 336 n 4; 535 NW2d 583 (1995). "An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MCL 418.131(1). This requires proof of the following elements:

> (1) "Actual Knowledge"—This element of proof precludes liability based upon implied, imputed, or constructive knowledge. Actual knowledge for a corporate employer can be established by showing that a supervisory or managerial employee had "actual knowledge that an injury would follow from what the employer deliberately did or did not do."
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> (2) "Injury certain to occur"—This element establishes an "extremely high standard" or proof that cannot be met by reliance on the laws of probability, the mere prior occurrence of a similar event, or conclusory statements of experts. Further, an employer's awareness that a dangerous condition exists is not enough. Instead, an employer must be aware that injury is certain to result from what the actor does.
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> (3) "Willfully disregard"—This element requires proof that an employer's act or failure to act must be more than mere negligence, e.g., failing to protect someone from a foreseeable harm. Instead, an employer must, in fact, disregard actual knowledge that an injury is *certain* to occur. [*Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997) (emphasis in original).]

Having reviewed the record, we conclude that the evidence created an issue of fact whether Lee was acting as plaintiff's supervisor, but not whether Lee had actual knowledge that an injury was certain to occur from asking plaintiff to use the 90 percent nitric acid to make nital.

Lee stated that he did not know that using 90 percent nitric acid could cause an explosion and there is no evidence of a prior incident that would confer such knowledge. See *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 184-187; 551 NW2d 132 (1996). The Material Safety Data Sheet indicates that when 90 percent nitric acid comes into contact with other material, it may cause fire. This indicates a possibility of fire, not a certainty. "When an injury is 'certain' to occur, no doubt exists with regard to whether it will occur." *Id.* at 174. Plaintiff's expert stated that "[t]he incompatibility (reactivity) of nitric acid with alcohols . . . is well known." The volatility of nitric acid is supported by the MSDS, which states that the chemical reacts explosively with alcohol. But the fact that this explosive tendency is well known suggests only that Lee should have known of the danger, and implied or constructive knowledge is insufficient.

Thus, without evidence that Lee saw the MSDS or was otherwise familiar with the volatility of nitric acid, actual knowledge is lacking.

There was testimony from a coworker that Lee himself said something about 90 percent nitric acid being dangerous. However, it is not enough that the employer know that a dangerous condition exists; the employer must "be aware that injury is certain to occur from what the actor does[.]" *Travis, supra* at 176. Thus, mere knowledge that an employee is exposed to a condition that creates a health hazard is not enough to prove actual knowledge of a certain injury. *Agee v Ford Motor Co*, 208 Mich App 363, 366-367; 528 NW2d 768 (1995).

Although plaintiff testified at his deposition that he told Lee the procedure was "risky," plaintiff admitted that he did not know what the specific risks were, much less that it would cause an explosion, and his subsequent affidavit to the contrary is insufficient to create an issue of fact. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001). The word "risky" is defined as "attended with or involving risk," and "risk" is defined as "exposure to the chance of injury." *Random House Webster's College Dictionary* (1997). A "chance" is "a possibility or probability of anything happening," *id.*, and a probability is not a certainty. Further, there is no evidence to indicate that "risky" is a term of art in metallurgy or chemistry. Thus, the fact that plaintiff may have meant to imply a high degree of serious harm by the term "risky" does not show that Lee would have understood it the same way.

We find no merit to plaintiff's contention that defendants' failure to maintain proper safety equipment, as documented in MIOSHA citations, is sufficient to establish an intentional tort. MIOSHA reports citing the employer for providing insufficient training and protection for workers "do not prove that a particular supervisory or managerial employee, who was also involved in the events [of the incident], had actual knowledge of the danger of certain injury." *Palazzola, supra* at 152-153. Because there was no evidence that Lee had actual knowledge that an injury was certain to occur, the trial court erred in denying defendants' motion for summary disposition.

Reversed.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra